

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

Docket No's. 50-413-OLA, 50-414-OLA

DUKE ENERGY CORPORATION

ASLBP No. 03-815-03-OLA

(Catawba Nuclear Station, Units 1 and 2)

January 29, 2004

MEMORANDUM

(Providing Notice of Granting BREDL Motion for Need to Know Determination
and Extension of Deadline for Filing Security-Related Contentions)

A quorum of the Licensing Board in this proceeding¹ today rules, in part, on Blue Ridge Environmental Defense League's [BREDL's] Request for Need to Know Determination and Motion for Extension of Deadline for Filing Security Contentions, filed January 13, 2004 (with a notation thereon that the filing "May Contain Safeguards Information"). Our rulings are made after hearing preliminary, non-Safeguards discussion on this Motion on January 15, 2003, in Charlotte, North Carolina, and further oral argument, including references to Safeguards Information, on January 21, 2004, in a closed *in camera* session in the Atomic Safety and Licensing Board Panel hearing room in Rockville, Maryland.

¹This proceeding involves Duke Energy Corporation's (Duke's) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station; Petitioners Nuclear Information and Resource Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) in August 2003 filed petitions to intervene and requests for hearing in response to a July 2003 Federal Register notice concerning this application. See 68 Fed. Reg. 44,107 (July 25, 2003). Administrative Judge Elleman was not available to hear argument on the motion at issue in this Memorandum and Order, insofar as it involves a request for Safeguards Information. Consequently, as agreed and arranged by the entire Licensing Board in the proceeding, and discussed with all participants, Administrative Judges Young and Baratta heard argument on, and rule today on, those aspects of BREDL's motion relating to Safeguards Information, as a quorum of the Board. Further argument on the motion insofar as it relates to certain Classified Information will be held on February 13, 2004, in Rockville, Maryland, and a ruling will thereafter be issued on those aspects of the motion.

As discussed more extensively in a separate, sealed Memorandum and Order also issued this date, taking into consideration the strong and appropriate security concerns relating to certain Safeguards Information sought in BREDL's Motion, particularly in this post-9/11 time, and balancing these with the particular needs of BREDL regarding the information in question as it deals with and relates to Duke's Security Plan Submittal, the Board finds a "need to know" with regard to this Safeguards Information on the part of only the following individuals associated with BREDL: BREDL's counsel, Ms. Diane Curran, and BREDL's expert, Dr. Edwin Lyman, both of whom have sought and received "L" level security clearances after undergoing appropriate investigation, which allow access to Safeguards information such as the material in question, assuming the requisite "need to know." (The material in question shall not be disclosed in any way to any support staff or other persons.)

The NRC Staff shall therefore, no later than February 2, 2004, make available to Ms. Curran and Dr. Lyman the materials described in the sealed Memorandum and Order of this date. The Staff shall provide sufficient notice to Ms. Curran and Dr. Lyman of the availability of these materials, on the morning of the day they are to be made available, so as to allow a reasonable amount of time to read the materials. Notice of the provision of the material shall also be provided to the Licensing Board and served on all participants.

The Board bases this "need to know" ruling on the rationale set forth in the accompanying sealed Memorandum and Order, and on the provision, found at § C.2 of the Protective Order proposed by the participants, and approved and issued by the Board pursuant to 10 C.F.R. § 73.21(c)(1)(vi) on December 15, 2003, that "[i]f a dispute arises regarding any 'need to know' determination under this Protective Order, the determination of 'need to know' will be made by the Licensing Board." Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (Dec. 15, 2003), at 4; *see id.* at 1 n.1; 2.

With regard to the motion for extension, as stated in the sealed Memorandum and Order, the Board finds it appropriate to grant an extension, as defined below. We do not grant the full 30 days from receipt of the material in question that BREDL requests, because we find some of the delay related to BREDL's motion is attributable to it, in that BREDL did not bring the dispute with the Staff to the attention of the Licensing Board earlier, at least after receiving word that the Staff would not be providing any response to BREDL's December 19, 2003, written request for the materials, until after the holidays. We also find, however, that the NRC Staff has significantly contributed to delay in this proceeding with regard to the materials requested by BREDL, in that three whole weeks passed before the Staff provided any response at all to BREDL's December 19, 2003, written request. Only at 3:30 on Friday afternoon, January 9, 2004, did the Staff provide even a verbal response through counsel that the items would not be provided. Then, after BREDL counsel requested of Staff counsel that same day a written response that would explain the denial, the Staff's verbal response was followed up by a short, one-page letter that was not provided until the last day before the original deadline for security-related contentions in this matter, and two days prior to the already-scheduled January 15, 2004, oral argument in Charlotte, North Carolina. On January 13, the same date it received the Staff's letter, BREDL filed its motion at issue herein.

Although the Staff has argued that "the staff's position has been from the beginning that these documents were not going to be provided" and that BREDL counsel "has known that the staff's position all along was that these documents were not going to be provided," as BREDL points out, until its counsel and expert were permitted to view Duke's security submittal (that is the subject of the December 15, 2003, Protective Order in this proceeding) on December 17, 2003, it "did not have any basis to argue with the Staff." As specified in detail in the sealed Memorandum and Order, various instances of Duke's reliance on information in the sought-after documents illustrate BREDL's argument in this regard and convince us of its reasonableness.

The failure of the Staff to respond to BREDL's timely December 19 request (made two days after first seeing Duke's submittal, and well before the original deadline for security-related contentions), until late Friday afternoon January 9 (21 days after the request was made), and then only verbally, and failing to provide any written response to BREDL's request therefor until January 13 (in response to which BREDL filed its motion the same day), have quite obviously cause delay in this proceeding, primarily attributable to the Staff, without good cause being shown for this delay. We thus find sufficient "unavoidable and extreme circumstances," imposed on BREDL by the Staff's delay, to warrant an extension in accordance with the following deadlines:

1. Any security-related contentions arising out of Duke's submittal and the Safeguards Information provided pursuant to this and the accompanying, sealed Memorandum and Order issued this date, shall be filed no later than 14 days after the date the Staff makes the material in question available to Ms. Curran and Dr. Lyman for their inspection at the NRC offices.

2. Responses to any such contentions shall be filed no later than 14 days after the filing of the contentions.

Oral argument on security-related contentions shall be set as soon as is practicable, taking into account the date the materials ruled on today are provided to BREDL counsel and its expert, as well as any future rulings with regard to certain Classified material, access to which is also sought by BREDL in its motion. Nothing in this Memorandum or the accompanying sealed Memorandum and Order should, however, be taken to indicate the direction or content of any future ruling with regard to any Classified material sought by BREDL.

We note Duke's request that we certify our "need to know" ruling to the Commission in view of any policy considerations involved herein. We also note, however, Duke's frequent statements in this proceeding, *see, e.g.*, Tr. 642, regarding the need for a timely resolution and conclusion of this proceeding, in order to meet DOE's schedule for transportation of plutonium to

France to be fabricated into fuel and the fuel assemblies, as well as Catawba's fuel cycle. We therefore will not mandate the additional time that certification of our ruling would necessarily entail, recognizing that any participant that wishes to appeal our Order may of course do so, taking into account any delay that would be occasioned thereby.

In conclusion, in recognition of the significant security concerns that have been recognized by all participants in this proceeding, we wish to re-emphasize the need for all participants to ensure that all required procedures set forth in the December 15, 2003, Protective Order are complied with regard to any and all Safeguards Information to which any participant has access, and to take whatever measures are necessary to protect against even any inadvertent disclosure of such information, at all points in this proceeding and thereafter.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 29, 2004²

²Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.